No. 13,746

IN THE

United States Court of Appeals

For the Ninth Circuit

CHOW SING, by his guardian ad litem, Chow Yit Quong,

Appellant,

vs.

HERBERT BROWNELL, JR., Attorney Gen- of the United States,

Appellee.

BRIEF FOR APPELLEE.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

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BRIEF FOR APPELLEE.

The previous judgment rendered in favor of defendant was vacated by the decision of this Court, 217 F. 2d 140, and the cause was remanded "with direction to make findings as to whether Chow Yit Quong was Sing's father, such findings to be made in the light of this opinion, and thereupon enter such judgment as may be proper." The trial court, pursuant to the mandate, rendered a supplemental opinion and findings upon the remand and judgment was again entered in favor of defendant.

SPECIFICATIONS OF ERROR.

Appellant has made six specifications of error. Actually, there are but two specifications.

(1) "The trial court failed to obey the mandate of this Court" in that a standard of proof was imposed contrary to the mandate.

(2) The findings and judgment of the District Court are "clearly erroneous."

ARGUMENT.

Appellant has referred to his briefs previously filed upon the occasion of the prior appeal. Appellee likewise refers to his briefs previously filed in response to appellant.

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(1) THE DISTRICT COURT FULLY COMPLIED WITH THE MANDATE OF THIS COURT.

The Court found (Tr. 192):

"In substantial respects the evidence introduced by plaintiff was inconsistent and contradictory and therefore not credible. Consequently, it is not accepted as true. The burden of proving his citizenship rested upon plaintiff. To sustain that burden plaintiff had to prove by preponderating evidence that Chow Yit Quong was his father. He may be, but plaintiff did not sustain the burden of showing it. Hence for that reason the court's finding is that Chow Yit Quong is not the father of plaintiff."

(a) The burden of proof was upon the appellants to establish their claims.

Bauer v. Clark, (CA-7) 161 F. 2d 397;
Mar Gong v. Brownell, (CA-9) 209 F. 2d 448;
Elias v. Dulles, (CA-1) 211 F. 2d 520;
Brownell v. Lee Mon Hong, (CA-9) 217 F. 2d 143;
Chow Sing v. Brownell, (CA-9) 217 F. 2d 140;
Law Don Shew v. Dulles, (CA-9) 217 F. 2d 146;
Fong Wone Jing v. Dulles, (CA-9) 217 F. 2d 138;
Wong Ken Foon v. Brownell, (CA-9) 218 F. 2d 444;
Lew Wah Fook v. Brownell, (CA-9) 218 F. 2d 924;
Lue Chow Kon v. Brownell, (CA-2) 220 F. 2d 187;
U. S. ex rel. Dong Wing Ott v. Shaughnessy, (CA-2) 220 F. 2d 537;
Lee Dong Sep v. Dulles, (CA-2) 220 F. 2d 264;
Ng Kwock Gee v. Dulles, (CA-9) 221 F. 2d 942.

This Court, in reversing and remanding the previous judgment, stated:

"We hold that Sing's burden of proof was the ordinary one."

What constitutes the ordinary burden of proof in such a case as this was not defined. The case of *Mar Gong v. Brownell, supra,* was cited. The following is quoted from *Mar Gong:*

> "We recognize all that may be said with respect to the necessity of the court guarding against imposition, but we are also of the view that no special quantum of proof should be exacted from any person claiming American citizenship *merely because of his racial origin.*" (Emphasis ours.)

At no time has there been a contention in any of the 903 cases that a special quantum of proof should be exacted from Chinese claimants simply because of racial origin. Judge Goodman's opinion upon which the previous judgment was founded stated that "proof of alleged citizenship must be clear and convincing," not as related to Chinese alone, but as to any claimant arriving at a port of entry of the United States and asserting the right to enter as a citizen by derivation under Section 1993.

Lee Sing Far v. U. S., (CA-9) 94 F. 834;
Woey Ho v. U. S., (CA-9) 109 F. 888;
Lee Sim v. U. S., (CA-2) 218 F. 432;
Ex parte Chin Him (Western D. N.Y.) 227 F. 131.

The original finding of the District Court in this case was that "the person (Sing) who claims to be plaintiff Chow Sing, has failed to introduce evidence of sufficient clarity to satisfy or convince this court that Chow Yit Quong is the natural blood father of the person known as Chow Sing or that the person (Sing) who appeared before the court claiming to be plaintiff Chow Sing is in truth and fact Chow Sing."

On the appeal from the judgment of the District Court this Court first filed a per curiam opinion on August 18, 1954. Said opinion held "The evidence sustains the findings", and affirmed the judgment. On November 24, 1954 an opinion written by Judge Mathew, without dissent, was filed. This opinion quoted the finding of the District Court in full and held, "The finding was not clearly erroneous. We therefore accept it as correct, and conclude, as did the District Court, that Sing was not entitled to the relief sought by him." The judgment was affirmed. By order of January 17, 1955 the opinion of November 24, 1954 was amended, to state: "However, it appears that the District Court proceeded on the theory that the burden of proof resting on *Sing* was different from and heavier than the ordinary burden of proof resting on plaintiffs in civil actions—a theory which was and is untenable. We hold Sing's burden of proof was the ordinary one. As to whether he sustained that burden, we express no opinion."

The remarks of Judge Goodman during the further proceedings following the remand of the mandate must be viewed in the light of the foregoing considerations.

After considerable discussion between counsel and the court, Judge Goodman made the following comment (Tr. March 11, 1955, p. 27):

> "The Court. Because of the nature of the cases. That is all there is to it.
>
> "I agree with Mr. Collett, this is not an adversary proceeding of any kind. I don't think that

was ever considered. The very language of the statute negatives that. It is a suit to declare American citizenship.

"It is true it has to have as a basis for it the fact that somebody is denied some right of citizenship. But what the Court is called upon to do is not to declare that 'A' gets judgment against 'B' for anything at all. By the very terms of the statute this is declaratory of citizenship.

"I don't know how anybody can get away from that fact. That is what the statute says. That is the jurisdiction that is conferred, to declare whether a person is or is not an American citizen.

"The reason jurisdiction is invoked is because some official or government has said to Jones, 'Well, I am not going to let you vote here', or 'You can't come into the United States', or some other specific act which denied a man a right which he had if he were an American citizen.

"So the statute says, it has given the Court the authority to declare whether a man is a citizen or not. That is really the basis upon which I proceeded in trying to formulate some rule that would be helpful. Apparently the judges up above didn't agree with that, although they have not yet held that this is an adversary proceeding of any kind.

"It is still a proceeding to declare citizenship. Now, it doesn't make any difference what kind of standard you apply. I think the Court has to decide whether the person has presented sufficient evidence to show he is an American citizen. That is all.

"Mr. Gale. That is it."

(2) THE JUDGMENT OF THE COURT BELOW IS NOT "CLEARLY ERRONEOUS".

(a) **The credibility of a witness is a matter exclusively for the determination of the trial court.**

Chow Sing v. Brownell, (CA-9) 217 F. 2d 140;
Mar Gong v. Brownell, (CA-9) 209 F. 2d 448;
Law Don Shew v. Dulles, (CA-9) 217 F. 2d 146;
Lew Wah Fook v. Brownell, (CA-9) 218 F. 2d 924;
Lee Dong Sep v. Dulles, (CA-2) 220 F. 2d 264;
Lue Chow Kon v. Brownell, (CA-2) 220 F. 2d 187;
Ng Kwock Gee v. Dulles, (CA-9) 221 F. 2d 942;
Wong Ken Foon v. Brownell, (CA-9) 218 F. 2d 444.

(b) **The mere say-so of interested witnesses, even though uncontradicted, does not have to be accepted.**

Quock Ting v. U. S., 140 U.S. 417;
Chin Yow v. U. S., 208 U.S. 8;
Marcella v. C.I.R., (CA-8) 222 F. 2d 878, 883;
Purcell v. Waterman SS. Co., (CA-2) 221 F. 2d 953;
Tam Dock Lung v. Dulles, (CA-9) 218 F. 2d 586;
Law Don Shew v. Dulles, (CA-9) 217 F. 2d 146;
NLRB v. Howell Chevrolet Co., 204 F. 2d 79, 86, Affd. 346 U.S. 482;
Noland v. Buffalo Ins. Co., (CA-8) 181 F. 2d 735, 738;

Heath v. Helmick, (CA-9) 173 F. 2d 157, 161;
Flynn ex rel. Yee Suey v. Ward, (CA-1) 104 F. 2d 900, 902;
Inouye v. Carr, 98 F. 2d 46;
Mui Sam Hun v. U. S., (CA-9) 78 F. 2d 612, 615;
Easton v. Brant, 19 F. 2d 46;
Quong Sue v. U. S., (CA-9) 116 F. 316;
Woey Ho v. U. S., (CA-9) 109 F. 888;
Lee Sing Far v. U. S., 94 F. 834.

(c) The repeated recognition by United States Courts of the incidence of fraud in Chinese claims to derivative citizenship must of itself require a judge to open his eyes and ears as to the nature of the evidence presented in support of a claim.

U. S. v. Sing Tuck—Justice Holmes, 194 U.S. 161;
The Chinese Exclusion Case—Justice Field, 130 U.S. 581;
Ex parte Jew You On—Judge Bourquin, 16 F. 2d 152;
Fong Ging Hung v. Acheson, (unreported)—Judge Lemmon, Civil Action No. 6599 (U.S. D.C. N.D.Cal.);
Gee Fook Sing v. U. S.—Judge Hanford, 49 F. 146;
Lee Sing Far v. U. S.—Judge Hawley, 94 F. 834;
Lee Sai Wing v. U. S.—Judge Rudkin, 29 F. 2d 108;
Ly Shew v. Acheson—Judge Goodman, 110 Fed. Supp. 50;
Mar Gong v. McGranery—Judge Westover, 109 Fed. Supp. 821.

The Second Circuit, in *U. S. ex rel. Dong Wing Ott v. Shaughnessy,* 220 F. 2d 537, in ruling on the ground of appeal that the blood tests are unconstitutional as a violation of due process because applied discriminatorily to applicants solely of the Chinese race, held that the ground must fail for two reasons. *First,* that it is not established that they are applied solely to Chinese, and *second,* that there is sufficient evidence of unusual circumstances relating to applicants born in China during the period in question to justify a requirement of such additional evidence. The Court said, page 540:

> "Such a classification based on the lack of reliable written governmental records of birth and percentage, difficulty of access to the areas from which the claimed family groups come, and long absences from the family group of the citizen father who is an identifying witness, are circumstances justifying the distinction as one not based on race or color."

In effect appellants ask this Court to *retry* the facts, and upon application of *United States v. U. S. Gypsum Co.,* 333 U.S. 364, to reverse the trial court as "clearly erroneous." The appellate court is not a fact finding de novo trial court. The court below viewed the witnesses and had the "live feel of the open forum" and its judgment is not "clearly erroneous."

CONCLUSION.

Upon the record as presented, the findings and judgment of the court below are adequately supported by the evidence. In accordance with *U. S. v. U. S. Gypsum Co., supra,* the judgment is not "clearly erroneous" and should be affirmed. The trial court did comply with the mandate of this Court. The entire reporter's transcript of the proceedings on the hearing before the trial judge upon the mandate of this Court is contained in the record herein. The contention by appellants that the trial court failed to obey the mandate is wholly unsupported by the record.

It is respectfully submitted that the judgment of the court below be affirmed.

Dated, San Francisco, California,
April 2, 1956.

Respectfully submitted,

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